NO. 09-19-00097-CR

IN THE COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS AT BEAUMONT

NATHANIEL ALLAN JOHNSON, *Appellant,*

v.

THE STATE OF TEXAS, *Appellee.*

Arising from:

Cause No. 18-10-14374
IN THE NINTH DISTRICT COURT,
MONTGOMERY COUNTY, TEXAS

STATE'S APPELLATE BRIEF

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ORAL ARGUMENT REQUESTED ONLY IF REQUESTED BY APPELLANT

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 38.2, the State hereby supplements the appellant's list of parties to this appeal with the names of all trial and appellate counsel for the State:

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STATEMENT OF THE CASE

The appellant was charged by indictment with second-degree-felony assault against a family member by strangulation, enhanced with a prior conviction for assault against a family member (C.R. 6). The indictment further listed two prior convictions for punishment enhancement purposes (C.R. 6). The appellant pleaded not guilty, but a jury found him guilty as charged (C.R. 187). After hearing additional evidence—including the appellant's true pleas to the enhancement paragraphs—the jury sentenced the appellant to imprisonment for life (C.R. 187).

STATEMENT OF FACTS

All R.S. wanted to do was sleep[1] (2 R.R. 77). R.S. worked a night shift for the Harris County District Clerk's Office and wanted to rest before she had to be at her office at 11:00 pm (2 R.R. 131). Instead, R.S. and the appellant—R.S.'s live-in boyfriend—began arguing because the appellant had been drinking and kept waking R.S. (2 R.R. 134–35). They also argued about money and about getting a dog (2 R.R. 133, 136). The appellant physically escalated the argument by pinning R.S.'s arm behind her back, getting on top of her, and pushing her head into a pillow to block her nose and mouth (2 R.R. 135–36). R.S.'s daughter A.S., as well

[1] To protect the victim's privacy, this brief identifies her and two minor witnesses by using initials. *See* Tex. Const. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

as A.S.'s friend E.T., witnessed this assault and attempted to stop it by hitting the appellant and calling the police (2 R.R. 265).

This was not the first time the appellant physically assaulted a family member. When the appellant lived in Arkansas he was arrested and convicted for assaulting his girlfriend, B.W. (2 R.R. 282; 3 R.R. 110–11).

SUMMARY OF THE STATE'S ARGUMENT

Reply to Points of Error One, Two, Three, and Four: To establish a defendant's prior conviction, the State must prove beyond a reasonable doubt that a prior conviction exists and that the defendant is linked to that conviction. By introducing a docketing statement reflecting a conviction for a prior incident of assault against a family member, and producing two witnesses involved in the offense, the State sufficiently linked the appellant to the prior conviction.

Reply to Point of Error Five: A defendant is entitled to a lesser-included-offense instruction if, among other requirements, affirmative evidence exists from which a rational jury could conclude that the defendant is not guilty of the charged offense but guilty of the lesser-included offense. R.S.'s complete denial that the appellant committed any criminal offense did not entitle the appellant to a lesser-included-offense instruction of misdemeanor assault.

REPLY TO POINTS OF ERROR ONE THROUGH FOUR

In his first four points of error, the appellant alleges that insufficient evidence proved that he had a prior conviction for an "offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Penal Code, against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005, or 71.0021(b) of the Family Code" (Appellant's brief at 8, 15, 19, 20).[2]

I. Sufficient evidence proved that the appellant had a prior conviction for assault against a family member.

The appellant's indictment required the State to prove that the appellant:

1. Caused bodily injury to E.S.;

2. By intentionally, knowingly, or recklessly impeding her normal breathing or blood circulation by applying pressure to her throat or neck or by blocking her nose or mouth; and

3. Had been previously convicted of an offense under Chapter 22, Chapter 19, or Section 20.03, 20.04, or 21.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code.

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[2] The appellant's first two points of error both allege straightforward sufficiency challenges. His third point of error challenges the trial court's denial of his motion for a directed verdict as to the prior conviction. But a challenge to the denial of motion for directed verdict is a challenge to the sufficiency of the evidence to support a conviction and is reviewed under the same standard. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996). The appellant's fourth point of error is merely restated a challenge to the trial court's denial of his motion for directed verdict as to the enhancement paragraph: that the trial court erred by not deleting the enhancement paragraph from the jury charge.

See Tex. Penal Code Ann. § 22.01(b-3) (West Supp. 2019). The appellant's first four points of error challenge the State's proof of his prior conviction.

To prove a prior conviction, the State must prove beyond a reasonable doubt that the conviction exists and that the defendant is linked to the conviction. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). Texas law does not require that the State prove a prior conviction in any specific manner. *Id.* at 922. A reviewing court should consider all the evidence supporting proof of the prior conviction in the light most favorable to the finding and determine whether a rational trier of fact could have found beyond a reasonable doubt that a defendant is linked to an existing prior conviction. *Brown v. State*, 508 S.W.3d 453, 456 (Tex. App.—Fort Worth 2015, pet. ref'd).

In *Brown*, the State offered documents from Alabama to prove that the appellant had a final felony conviction for punishment-enhancement purposes. *See id.* at 457. The defendant argued that those documents were insufficient as they did not comply with the Texas Code of Criminal Procedure's requirements for a judgment of conviction. *See id.* at 456. But the court of appeals noted that the documents, though not labeled a judgment and missing some information required in a judgment by the Code of Criminal Procedure, still identified the case number, the appellant's name, a date of birth, a description of the charge, the date of indictment, the date of arrest, the defendant's entry of a guilty plea, the trial court's

finding of guilt, a description of the defendant's punishment, and the last four digits of the defendant's social security number. *See id.* at 457. The court then held that because the documents contained such detailed information, they provided sufficient information to prove that the defendant was previously convicted of a felony. *Id.*

Here, the State offered Exhibit 11, a certified two-page document from Arkansas reflecting that a Nathaniel Allen Johnson was charged with "Battery 3rd Degree Domestic" on May 27, 2009 (5 R.R. 56–57). The document further indicated the date of birth and social security number of the individual charged (5 R.R. 56–57). The document also stated that the charged individual pleaded guilty and was found guilty on September 1, 2009, and was ordered to pay a $500 fine (5 R.R. 56–57). In addition, the State offered Exhibit 13, a document from the Texas Department of Public Safety that identifies Nathaniel Allen Johnson as having the same date of birth and social security number as the Johnson on the paperwork from Arkansas (5 R.R. 58).

To support its documentary evidence, the State called two witnesses. First, the State called Lieutenant Randal Gilbert of the Union County Sheriff's Department (2 R.R. 274). He testified that when he worked for the El Dorado Police Department, he arrested the appellant for the offense reflected in Exhibit 11 (2 R.R. 277–78). Gilbert also testified that the social security number and date of

birth on Exhibit 11 are the appellant's social security number and date of birth (2 R.R. 281–82). Second, the State called B.W., who testified that police arrested the appellant for assaulting her on May 27, 2009, when they were in a romantic relationship (3 R.R. 110–11). She also identified a photograph on Exhibit 13 as the appellant (3 R.R. 112).

So considering the State's documentary evidence and witnesses who connected those documents to the appellant, the State proved that a prior conviction existed and that the appellant was linked to that conviction.

II. The appellant's Arkansas conviction contained substantially similar elements to the relevant Penal Code offenses.

The State's pleadings also required the State to prove that the conviction was for an offense "under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Penal Code, against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005, or 71.0021(b) of the Family Code" (C.R. 6). A conviction under another state's laws for an offense containing substantially similar elements to the above-listed offenses is a conviction of the offenses listed. *See* Tex. Penal Code 22.01(f)(2).

Whether the elements of two offenses are substantially similar is a legal question that rests solely with the trial court. *Hill v. State*, 392 S.W.3d 850, 859 (Tex. App.—Amarillo 2013, pet. ref'd) (citing *Ex parte White*, 211 S.W.3d 316, 318 (Tex. Crim. App. 2007)). The Court of Criminal Appeals has held that statutes

are substantially similar if their elements display a "high degree of likeness," even if they are less than identical. *Fisk v. State*, 574 S.W.3d 917, 925 (Tex. Crim. App. 2019). To determine whether the trial court properly held that the Arkansas statute underlying the appellant's conviction has substantially similar elements to the relevant Texas statutes, an appellate court may take judicial notice of the Arkansas statute, even if it does not appear in the appellate record. *See Hill,* 392 S.W.3d. at 857 n.4; *see also* Tex. R. Evid. 202.

The appellant's Arkansas conviction paperwork indicates that he was convicted of "Battery 3rd Degree Domestic" (5 R.R. 56). This language corresponds closely with section 5-26-305 of the Arkansas Code, titled "Domestic battering--Third degree," which makes it an offense if:

> 1. With the purpose of causing physical injury to a family or household member, the person causes injury to a family or household member;
>
> 2. The person recklessly causes physical injury to a family or household member;
>
> 3. The person negligently causes physical injury to a family or household member by means of a deadly weapon; or
>
> 4. The person purposely causes stupor, unconsciousness, or physical or mental impairment or injury to a family or household member by administering to the family or household member, without the family or household member's consent, any drug or other substance.

Ark. Code Ann. § 5-26-305(a) (West Supp. 2017). Further, "family or household member" includes spouses, former spouses, persons related by blood within the fourth degree of consanguinity, current or former roommates, or persons previously or presently in a dating relationship. *Id*. § 5-26-302(2) (West 2006). So the appellant's Arkansas conviction was based on a statute with elements with a high degree of similarity to Tex. Penal Code § 22.01(a)(1) committed against a family member.

And though the Arkansas statute contains additional manner and means of committing the offense that do not precisely match the Texas statute, such an incongruity is not fatal to the "substantially similar" analysis. *See Fisk*, 574 S.W.3d at 922. In *Fisk*, the federal statute in question contained ways of committing sexual assault other than those substantially similar to Texas's sexual assault statute. *Id.* The Court of Criminal Appeals concluded that the fact that the federal statute had additional ways of committing the offense was irrelevant, because it still contained elements substantially similar to the elements of an offense under Texas law. *Id.* Here, the Arkansas statute has elements substantially similar to Texas's assault-family-violence statute, so it qualifies as a previous conviction under section 22.01(f)(2).

This Court should overrule the appellant's first four points of error.

REPLY TO POINT OF ERROR FIVE

In his final point of error, the appellant complains that the trial court erred in denying his request for a lesser-included offense instruction of misdemeanor assault (Appellant's brief at 21).

I. A lesser-included-offense instruction requires some evidence that would permit a jury to rationally find that the appellant is guilty only of the lesser-included offense.

A reviewing court employs a two-step test to determine whether the trial court was required to give a requested charge on a lesser-included offense. *Hardeman v. State*, 556 S.W.3d 916, 921 (Tex. App.—Eastland 2018, pet. ref'd). First, the court must determine whether the requested instruction was for an offense that is a lesser-included offense of the charged offense. *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016). Second, the reviewing court asks whether there is evidence in the record that supports giving the instruction to the jury. *Id.* at 924–25. It is well-established that assault family violence is a lesser-included offense of assault family violence by strangulation. *See Guzman v. State*, 552 S.W.3d 936, 947 (Tex. App.—Houston 2018, pet. ref'd); *Hardeman*, 556 S.W.3d at 921. So the only question is whether any evidence in the record supported giving the lesser-included instruction.

Under the second step of a lesser-included offense analysis, a defendant is entitled to an instruction when there is some evidence in the record that would

permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. *Bullock*, 509 S.W.3d at 925. In other words, the evidence must establish that the lesser-included offense is a valid, rational alternative to the charged offense. *Id.* It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather there must be some evidence directly germane to the lesser-included offense for the fact finder to consider before a lesser-included offense instruction is warranted. *Id.*

Ordinarily, a defendant or victim's testimony that the defendant committed only part of the charged offense is sufficient to warrant a lesser-included instruction. *See id.* at 929; *Hardeman*, 556 S.W.3d at 923. In *Bullock*, the defendant testified that he illegally entered a truck with intent to steal items, but he never intended to steal the vehicle. *See Bullock*, 509 S.W.3d at 926. The Court of Criminal Appeals held that the defendant was entitled to a lesser-included-offense instruction on attempted theft because the jury could have believed the defendant did an act amounting to more than mere preparation by entering the truck but failing to exercise control of it, disbelieved the defendant's testimony that he did not intend to steal the truck, and inferred an intent to steal the truck from the defendant's testimony that he illegally entered the truck with the intent to steal other items. *See id.*

Similarly, in *Hardeman*, the victim testified that the defendant grabbed her, but that he never put her in a chokehold or otherwise impeded her breathing. *See Hardeman*, 556 S.W.3d at 919. The defendant's partner, the victim's mother, also testified that the defendant grabbed the victim but did not touch the victim's neck in any way. *Id.* The court of appeals concluded that because there was evidence that the appellant grabbed the victim but did not impede her breathing, the defendant was entitled to a lesser-included instruction on misdemeanor assault. *See id.* at 923.

But a defendant's testimony that he committed no offense, or testimony that otherwise shows that no offense occurred, is not adequate to raise the issue of a lesser-included offense. *Lofton v. State*, 45 S.W.3d 649, 652 (Tex. Crim. App. 2001). In *Lofton*, the defendant—charged with assaulting a public servant—requested a lesser-included-offense instruction of resisting arrest. *See id.* at 651. The court of appeals held that the defendant was entitled to the instruction because "from the evidence before it, the jury could have rationally believed that [the defendant] intended to obstruct the arrest and the force he used was incident to that intent." *Id.* The Court of Criminal Appeals disagreed, holding that because the defendant denied committing any offense, resisting arrest was not a rational alternative because the State proved that the appellant assaulted a peace officer. *Id.*

Like a defendant's denial that an offense occurred, evidence of a victim's recantation also does not trigger a lesser-included-offense instruction. *See Smith v. State*, No. 12-17-00106-CR, 2018 WL 5276721, at *4 (Tex. App.—Tyler Oct. 24, 2018, pet. ref'd) (mem. op., not designated for publication). In *Smith*, the defendant argued that evidence of his victim's previous recantation entitled him to a lesser-included instruction of sexual assault. *See id.* But the court of appeals held that evidence of the victim's recantation merely called the victim's credibility about the charged offense into question, and did not negate the charged offense while affirmatively raising only sexual assault of a child. *Id.*

II. Misdemeanor assault was not a rational alternative to the charged offense.

All of the evidence in the appellant's case showed either that the appellant committed the charged offense by blocking R.S.'s air ways, or that the appellant committed no offense at all. The State called seven witnesses who testified about the charged offense.[3] Four of those witnesses testified about R.S.'s statements about the offense, and three witnesses testified about the event itself. As summarized below, none of the seven fact witnesses offered evidence that if the defendant was guilty, he was guilty only of misdemeanor assault.

[3] The State's other four witnesses testified either about the prior conviction or as experts related to family violence and strangulation.

Four witnesses testified that R.S. told them that the appellant pushed her head into a pillow so that she could not breathe. Conroe Police Sergeant Billy McPike testified that R.S. was "distraught" and that she had difficulty breathing (2 R.R. 28). R.S. told McPike that during an argument, the appellant had twisted her arm back and pushed her head into a pillow so that she could not breath (2 R.R. 30). McPike observed that the right side of R.S.'s face was red and swollen and that her arm was red (2 R.R. 31). The jury also observed R.S. accuse the appellant of pushing her face into a pillow on McPike's body camera video (2 R.R. 35). R.S. told Officer Ty Taylor and Officer Andrew Lupnitz the same things (2 R.R. 77, 91; 3 R.R. 34–35). R.S.'s daughter told Lupnitz that she saw the appellant pushing R.S.'s head into the pillow (3 R.R. 38). Finally, Amayramy Risney testified that R.S. told her that the appellant blocked her nose and mouth by pushing her face into a pillow (3 R.R. 92).

In contrast to the witnesses who testified about what R.S. told them, three witnesses who were present in R.S.'s home testified about what happened. R.S. testified that she made up the assault because she was angry that the appellant had been drinking (2 R.R. 139). She testified that at one point the appellant grabbed R.S.'s arm, but that it did not cause any pain (2 R.R. 138). She repeatedly stated that the appellant never pinned her arm back or pushed her head into a pillow (2 R.R. 141–55). A.S. testified that she did not see what happened between the

appellant and R.S. (2 R.R. 239). Finally, A.S.'s friend E.T. testified that she saw the appellant on top of R.S., pushing her head into a pillow (2 R.R. 264).

R.S.'s trial recantation, like in *Smith*, only contributed to the defendant's theory that R.S. was not credible about whether the assault occurred.[4] Her complete denial that the appellant committed an assault did not give the jury affirmative evidence that the appellant was guilty only of misdemeanor assault. Rather, the State's evidence gave the jury only two rational choices as to the appellant's actions: he either assaulted R.S. by blocking her nose and mouth, or he didn't assault her at all.

III. The current standard for lesser-included offenses should be revisited.

Even if this Court holds that, under the standard set forth in *Bullock,* the appellant was entitled to a lesser-included-offense instruction based on R.S.'s testimony recanting her assault allegation, that standard should be revisited. In *Bullock*, the Court of Criminal Appeals held that a jury could infer a necessary element of a lesser-included offense from the totality of the evidence and reach the lesser-included offense by mixing and matching different testimony from the defendant and the complainant. *Bullock*, 509 S.W.3d at 926. The Court of Criminal Appeals held that, despite the appellant's repeated assertions that he did

[4] In his closing argument, the appellant repeatedly inferred that R.S. was not credible because she admitted in trial that she lied to police about the appellant assaulting her (3 R.R. 185–200).

not intend to steal the truck, the fact finder could still infer such an intent from the totality of the evidence and reach the lesser based on the defendant's partial admission to criminal actions less than those charged. *See id.* Such a standard is unworkable.

The court of appeals's opinion in *Hardeman* underscores the unworkability of *Bullock*. In *Hardeman*, the State argued that the defendant was not entitled to an instruction on misdemeanor assault on a reckless theory because he testified that he intentionally grabbed the victim to prevent her from running into the street. *Hardemann*, 556 S.W.3d at 923. The court of appeals noted it could find no authority for the proposition that a defendant is restricted to his defensive theory in requesting a lesser-included-offense instruction. *See id.* But like in *Bullock*, allowing a lesser-included-offense instruction based on inferences allows a defendant to raise one theory—that he committed no offense—and then fall back on a theory that he never raised.

Conceding partial guilt is a strategic decision a defendant may make in order to persuade a jury to convict him of a lesser offense. Allowing a jury to infer the elements for the lesser and disbelieve part of a defendant's—or victim's—testimony that no offense occurred undermines the standard that requires affirmative evidence negating the greater offense and raising the lesser. It requires a trial court to have photographic memory of every part of trial to determine if any

word spoken by any witness might allow the jury to infer the lesser offense and disbelieve the greater. Such a standard is unworkable and should be revisited.

This Court should overrule the appellant's fifth point of error.

CONCLUSION AND PRAYER

It is respectfully submitted that all things are regular and the judgment of the trial court should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH RULE 9.4

I hereby certify that this document complies with the requirements of Tex. R. App. P. 9.4(i)(2)(B) because there are 3,613 words in this document, excluding the portions of the document excepted from the word count under Rule 9.4(i)(1), as calculated by the Microsoft Word computer program used to prepare it.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served via efile.txcourts.gov to Mr. Jon Jaworski, counsel for the appellant, at jaaws@peoplepc.com on the date of the submission of the original to the Clerk of this Court.

/s/ Philip S. Harris
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